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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 61

E. S. EVANS, *et al.*,

Petitioners,

v.

CHARLES E. NEWTON, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITIONERS' REPLY BRIEF

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I.

General Reply.

Respondents' brief addresses itself to a number of special points in petitioners' argument (and in that of the United States as *amicus curiae*). It is petitioners' belief that these special arguments can best be replied to within a framework which exhibits the relevance (or lack thereof) of the issues to which respondents address themselves. With deference, it seems to petitioners that the tendency of respondents' brief is to confuse; the most effective reply is a clearer structuring of the issues.

The following are the affirmative parts of the decree of the Superior Court: (1) The acceptance of the City's resignation as trustee, (2) The appointment of new trustees. It is against the affirmance of this judicial decree that petitioners complain to this Court. Primarily, what petitioners

ask of this Court is a reversal, and a remand with directions to vacate that decree and undo its effect.

The Superior Court entered this decree in a suit brought by persons appointed by a public authority, with the announced sole purpose of bringing about the reinstitution of racial discrimination in Baconsfield. The resignation accepted was tendered by a public authority on the assigned sole ground that its tendering and acceptance would make possible such reinstitution of racial discrimination. The new trustees, under these circumstances, were appointed in order that they might discriminate. It is petitioners' contention that the Superior Court's action in accepting the resignation, and in appointing new trustees, given the nature of the parties and the state of the pleadings before it, constituted the last and crucial step in a set of actions violative of the Fourteenth Amendment.

Petitioners contend that the Superior Court's action was violative of the Fourteenth Amendment, and must be reversed and undone, on *either* of two hypotheses, which exhaust possibility:

> (1) The Superior Court's action was violative of the Fourteenth Amendment, if it be assumed that the new trustees, if confirmed in office, might constitutionally discriminate. On that view (which petitioners think the wrong view) the actions of the Board of Managers and of the City, and the action of the Superior Court confirming the steps they had taken, are unconstitutional on the ground that it is not the proper business of any public authority to act affirmatively to clear the way for racial discrimination, even though that discrimination will have become lawful in itself in con-

sequence of the accommodating governmental action. Here, of course, one parallel will be *Shelley* v. *Kraemer*, discussed at length by respondents, but this is so much stronger a case than *Shelley* that none of the perplexities surrounding that case in many minds should impede decision in this case. Here the intervention of public authority—Board of Managers, City, and a Court of Equity supervising a charitable trust—is several orders of magnitude higher than in *Shelley*. And here, in contradistinction to the lower court's action in *Shelley*, the public power is not carrying out an unequivocally expressed private choice, but is itself inescapably choosing between two equally clear instructions of the testator, incompatible as a matter of law.

(2) The Superior Court's action was violative of the Fourteenth Amendment if the resegregation of Baconsfield by the new trustees would itself violate the Fourteenth Amendment, because on that hypothesis the action of the Board of Managers, the City and the Court was directed at the institution of a discrimination forbidden by the Constitution. It would not matter that a new lawsuit might after a lapse of time correct the discrimination. The Constitution forbids racial discrimination for a day or a year as well as for a century. If it will be unconstitutional for the new trustees to segregate, then it was unconstitutional for the Superior Court to put them in office for that unlawful purpose, after a resignation, tendered by a City, for the same announced unlawful purpose.

It is to be the establishment of the second of these alternative grounds that the establishment of the illegality of

discriminatory operation of Baconsfield, by the new trustees, is essential. (The unlawfulness of such operation with the city as trustee is conceded by itself.) Petitioners, replying to respondents' arguments, will contend that such operation would be unlawful:

(1) Because the state power, favoring charitable trusts and policing compliance with their terms, would be involved in a manner forbidden by the doctrine of *Shelley* v. *Kraemer*.

(2) Because, against the background of Georgia law prior thereto, §69-504 of the Georgia Code must be taken to have constituted a form of state influence surrounding the creation of trusts; indeed, that section, against such background, seems to have made flatly unlawful the *unsegregated* limitation—"*all* women and children"—exactly corresponding to the segregated one Senator Bacon used—"*white* women and children."

(3) Because the public character of Baconsfield—not necessarily as a charitable trust in general, but as a charitable trust that can be held to be such *only* because of its wholly public purpose and, indeed, its taking over of a governmental function—invests it with governmental character.

(4) Because, beginning with its necessary *affirmative approval* of the conditions in Senator Bacon's will (Georgia Code 69-501, Acts, Ga. 1892, p. 104), the past involvements of the City with Baconsfield are such as to make it impossible for a formal transfer to eradicate the factor of state involvement in its operation.

Petitioners, then, contend that the decree entered below violated the Fourteenth Amendment on *either* of the two

possible views. It was either (1) the last and confirming step in a series of actions, themselves taken by public authority, by which a racial discrimination previously unlawful was purposefully made lawful, or (2) the last and confirming step (as petitioners urge is the correct view) in a series of such actions, by which an unlawful racial discrimination was made factually possible, at least for a time. On either view, reversal is required, and the apt remedy is a mandate requiring rejection of the City's resignation and rescission of the appointment of new trustees. While petitioners will reply one by one to such of respondents' points as require it, each such reply should be read with the above outline in mind.

II.

Certain Particular Errors in Preliminary Parts of Respondents' Brief.

A. *"The Board of Managers of Baconsfield."*

Under the quoted heading, at p. 12 ff., respondents contend that the Board of Managers of Baconsfield is not an organ of public power in any sense. "The Board is not the agent of the City but of Mr. Bacon." p. 12. This contention is made in the face of the fact that the Board is appointed by the City Council, to supervise a park of which the City is trustee. That Georgia law and equity give such trustee no power over such a Board is hard to believe. See, Bogert, Trusts and Trustees, §391, at pp. 205-6 (1960). But in any event the Board was, at the crucial time of the inception of this lawsuit, and until appeal was taken from the lower court's decree, constituted, as to personnel, by the City Council. It was, moreover, all white (a thing

which can hardly be held immaterial to its deciding to start this suit) because the City Council, a purely public authority, obeyed a private man's wish by making all white appointments, thus discriminating racially.

The petition in the court below seems in itself to recognize the City's ascendancy over the Board, at least in part, for it confesses the Board's inability to control the park's use, while at the same time saying that a new trustee, in the City's place, would have powers the Board does not have. If the Board is independent of the City, why could it not have done what the new trustee could do?

But if the respondents were to succeed in establishing their thesis that the Board was in complete charge, independently of the City, they would have won a Pyrrhic victory. They rightly see that this thesis requires that the City be viewed as a "passive title holder," a characterization said by respondents to be of "vital significance." (Respondent's Brief, p. 12) But if that really were all the City was, then its "resignation" was a sham, a "resignation" from nothing, a "resignation" which could have had no reason, and can bear no significance, except clearing the road for the continuing all-white character of Baconsfield. If respondents are right, the City had no duties to resign from, and resigned away only the claims of its colored citizens. None of the substantial reasons for allowing trustees' resignations would apply (see Bogert, Trusts and Trustees, §515 (1960)), and to "freeze" the City as trustee (see Respondents' Brief, p. 43) would "freeze" it in nothing, but would, on a practical analysis, be no more than requiring it not to act affirmatively as an accessory before the fact to racial discrimination, while at the same time very substantially breaking its trust, as a City, to all its citizens.

Finally, the involvements of the City, in tendering its "resignation" and in other manners, are so deep, that the public power is vitally engaged, whatever view be taken of the status of the Board of Managers.

B. *"The Scope of the Georgia Supreme Court's Decisions."*

In the section so headed, respondents appear to be contending that no issue of federal law was raised before or decided by the Georgia Supreme Court. This thesis is one petitioners confess difficulty in understanding. Petitioners' amended petition for intervention, in the Superior Court, objected on federal constitutional grounds to the exact action the court later took (R. 63). The repugnancy of this action to the Fourteenth Amendment was assigned as error to the Georgia Supreme Court (R. 2). As stated and in substance, this was a federal question, the question whether the resignation could be approved, and new trustees substituted, all for the overtly proclaimed purpose of re-segregating Baconsfield, without violation of the Fourteenth Amendment. No legerdemain, no prestidigitation with state code provisions, can make that question anything but federal.

It is true that, when the order was entered in the Superior Court, segregation had not yet recommenced. But it had been announced repeatedly, on the sheer common-law record, that the purpose of the whole proceeding was resegregation, that that and only that was what the order was in aid of, and that the business would be getting under way as soon as practicable after the order was signed. Whether the judicial act performed in that context and with that effect was in violation of the Fourteenth Amendment is the central federal question in this case. That it

has clear logical connections with the further federal question—whether the racialist operation of the park by "private" trustees also violates the Fourteenth Amendment, does not make it any the less a question in itself, or any the less "federal".

III.

The Respondents Are Mistaken in Maintaining "the Private Nature of Charitable Trusts" (Brief p. 23) and in Their Deductions Therefrom.

Perhaps seeking to meet petitioners' arguments (Petitioners' Brief, pp. 22 ff.) that the public character of Baconsfield tends to bring this case within the rule of *Marsh* v. *Alabama* and other cases, so as to render unlawful its contemplated all-white operation (see *Summary* above, p. 4), the respondents draw large consequences from *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, a case almost entirely unrelated to this one, on its holding. The draft they make on that famous opinion is not honored by its language, as they quote it:

> "But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, . . . " (4 Wheat. 630).

But Baconsfield is not private. It is "dedicated to the public use," in the language of the statute authorizing its creation, Ga. Code §69-504. The funds for keeping it up are

authorized to be "covered" into the City Treasury (R. 24). Its objects, far from being "unconnected with government," are governmental objects, more often attained by governmental action than by any other means.

We have to do here not with a college—planning curriculum along special lines, hiring faculty by acts of judgment, selecting students for special aptitude, choosing books, closed by its very nature to the general public—but with a park, altogether public except for Negroes. The question whether the "private" character of a charitable trust for a college would, if granted, irresistibly (though paradoxically) imply a similarly "private" character in a charitable trust for a public park, is a question that can be sensibly answered only by recourse to the respective (and very different) reasons of the law for supporting these two so dissimilar "charities". Such a comparison is instructive, for it serves to highlight and make both manageable and limitable the definite public character of such trusts as the Bacon trust.

"Schools of learning, free schools, and scholars" are in the Elizabethan statute, 43 Eliz. c. 4; cf. Ga. Code §108-203. Such gifts can be and commonly are limited to restricted classes, and to restricted aspects of education. *Paschal* v. *Acklin*, 27 Tex. 173 (1863); *Dexter* v. *Harvard College*, 176 Mass. 192. A park for the use of one person a year, or of all who could pass a special examination, never was thought to be a charitable object.

The reason, in the case of educational trusts, is succinctly stated in Bogert, Trusts, §375:

> Society will be aided if any or all of its citizens, rich or poor, obtain wisdom, knowledge, skill or culture.

The theory upon which charitable trusts for parks have been sustained, as summed up by the same authority, is different *toto coelo*. The title of the paragraph is included, because it speaks directly to the theoretical question:

§378. Governmental Trusts—Community Benefits

Governments (whether national, state or local) have as their objects the furnishing of facilities and services which will make the lives of their citizens comfortable and safe. They carry benefits of a social nature to large groups. Their work is not confined to distributions for the mere financial enrichment of their inhabitants. Trusts for governmental or municipal purposes are therefore charitable. In the Statute of Charitable Uses these trusts were represented by gifts for the repair of bridges, ports, havens, causeways, sea banks, and highways.

* * * * *

Types of Governmental Benefits

Examples of charitable trusts of this class are to be found where the purpose of the trust was to furnish to the inhabitants water, light, or gas, at cost or less, or supply other public utility services which are usually or occasionally furnished by municipalities; to construct or repair streets, sidewalks, roads, or bridges; to erect or keep in order sea dykes, landing places, levees, docks, and similar works on the ocean or other water fronts; to supplement the existing police or fire departments of a municipality; to establish or aid life saving stations; *to originate or maintain public parks or playgrounds,* and monuments, fountains, gates, or other ornamental or useful structures therein; to pre-

> serve natural scenery, or to beautify public property or private grounds by encouraging the keeping of fine yards and gardens or by planting trees, shrubs, or flowers; or to improve the living conditions of the people, or to promote understanding and good feeling between different groups in society, or to aid the cause of peace. Bogert, Trusts and Trustees, §378, pp. 170, 177-180 (1960). (Emphasis supplied and footnotes omitted.)

This passage has been quoted at length because it is only in a full context that we can perceive how thoroughly the very concept of the charitable trust for a park is saturated with public character. It is held to be charitable precisely because it is public in all its bearings—because its maintenance is a governmental function, and because it is directly accessible to all. (A secondary authority, summing up the law, has been used, because there are no Georgia cases, and it is the general state of the subject that is relevant to the present purpose.) The public character of such a trust as the present, and perhaps even the essentiality of that character to its validity, is recognized very clearly in Georgia Acts 1937, No. 50, p. 594, declaring that "all gifts to the United States, or to any state or to any sub-division thereof for any public purpose, shall be charitable."

We have dealt with this abstract issue, "public *vel non*," because respondents have posed it, but the significance of the term "public" can be assessed only in the context of some purpose, e.g.: Do we mean "public" so as to suggest a parallel with *Terry* v. *Adams*? Or so "public" that the failure of the state affirmatively to prevent racial discrimination is a "denial" of equal "protection" in the community

life—a denial which may result from state "inaction" as well as from state "action"—if, against plausibility, the state be thought not to "act" in its favoring of charitable trusts? For these purposes, the different kinds of charitable trusts may well be not reducible to a single category. This case cannot pose all the issues that will arise in later cases, and we are in no position either to plead future and perhaps hard cases, or to make concessions for those who will be involved in them. But we do submit that where a trust, such as this one, is of a sort held "charitable," with all of state favor such a holding implies, only on the grounds that it extends a benefit immediately to the public at large, and that it performs a function of government, then that trust ought to have to respond to constitutional guarantees. We submit that such a case falls squarely within the principle of *Marsh* v. *Alabama*, 326 U. S. 501; if the streets of the town had been dedicated on charitable trust, with the formal title in a trustee selected by the Company, and the dirty work in the hands of a Board of Managers, could Marsh's conviction have stood? We submit that such a case as the present should be held within the reason of *Terry* v. *Adams*, for a governmental function is as definitely being performed in this case as in that.

Respondents (their Brief, p. 26) imagine horrible results if Baconsfield be opened to all the citizens of Macon. These all disappear when one grants to this Court the capacity to make proper distinctions for reasons of weight. Religious "discriminations" in institutions never opened to the general public may not be "arbitrary" at all, but may on the contrary be implementary to religious liberty; racial discrimination invokes no analogous countervailing constitutional or societal value. The first opinion construing the Fourteenth Amendment, *The Slaughterhouse Cases*, 83 U. S.

(16 Wall.) 36, recognized and emphasized the obvious historic fact that the Amendment was aimed primarily at eliminating racial discrimination; to say that racial discrimination is always forbidden is not to say that every differentiation is always forbidden. At the same time, some of the respondents' horribles need thinking about, when brought closer to this case. Suppose a large public park in Macon were, by the will of a man long dead, open to and frequented by the whole public, except that Roman Catholics were excluded? This example, authentically horrible, seems the logical consequence of the position respondents urge. If every "charitable" trust for a governmental purpose, like this one, is immune from federal constitutional standards, then a few rich men and a compliant city administration could racialize a town, suppress free speech in many of its functionally public places, and impose serious disadvantages on minority religions, without responding to the Fourteenth Amendment. It happens that only Negroes now have to fear a widespread use of the doctrines the respondents urge. But they should not be made, because of their unique political vulnerability in the present time, victims of a theory that has no stopping place short of such a consequence.

IV.

The Appropriate Remedy in This Case (Replying to Respondents' Point II).

In this point, respondents seek to send the federal claim of petitioners wandering in an untraceable labyrinth of state law. As always, this attempt has to fail; the clue, as always, is the Supremacy Clause.

There is more than one way to violate the Fourteenth Amendment. Petitioners claim, to be sure, that segregation of this park by "private" trustees, against the background shown on this record, would in future violate the Fourteenth Amendment. But petitioners also claim that the organs of the State of Georgia may not, in a lawsuit brought for the announced purpose of segregating a facility which by no other means can be segregated, act in concert for the proclaimed end of attaining this segregation. One body appointed by a public authority brought a suit praying that the court so alter the legal position as, on their theory of the matter, to clear the way for segregation. A second body—the City of Macon—obligingly cleared the way, announcing in a resolution of the Council that said that was its purpose. The Superior Court then acted judicially by accepting a resignation tendered on this ground and this ground only, being apprised by the record before it that that was the ground and that the whole proceeding before it had no other aim or expectable effect. Starting with a situation in which, by repeated confession, exclusion of Negroes from Baconsfield was unlawful, these parties, wielding state power, so acted as, at least hopefully, to make it lawful, and (if that hope were doomed to be vain) so as to make it factually possible until another lawsuit was

brought. Whatever else violates the Fourteenth Amendment, that kind of action by state-empowered governmental entities violates that Amendment. State-law categories and state-conferred powers can have no bearing on the matter.

Nor is the remedy in this court unclear or difficult. The decree of the Superior Court, accepting the City's resignation and appointing new trustees, was an essential step in a set of actions violating the Fourteenth Amendment. If this case goes back to the state court under a mandate that that decree be reversed, then what has been done up to now will be undone.

It is quite true that, if "private" trustees are confirmed in their trusteeship, and exclude Negroes from this park, these petitioners or others similarly situated may apply for relief, contending that such segregation violates the Fourteenth Amendment. It is also true that, on one alternative, the merits of the present suit implicate the question that would then be raised, for if exclusion of Negroes by the new trustees would be *unlawful*, then the decree of the Superior Court constituted a substitution of a trustee who proposed to segregate, for one who was not segregating. This judicial action, on the hypothesis that segregation of Baconsfield by any trustee would violate the Fourteenth Amendment, would amount to the appointment by a Georgia court of a trustee who proposed to infringe the Constitution, for the purpose of his infringing it. And the remedy in this court at this step would be just the same—the undoing, by apt mandate, of this judicial action hostile to the federal right.

It is because of its relevance in the second of these alternative theories that petitioners—joined by the United States as *amicus curiae*—have presented argument that

segregation of Baconsfield, in the whole setting, would violate the Fourteenth Amendment, whoever the trustee might be. In the procedural setting of this case, that argument, though very important, is immediately material only as it establishes the impropriety of the lower court's action in bringing about a state of things in which a trustee appointed for the purpose of segregating takes office. But, petitioners also contend that the alteration of affairs so that a previously unlawful segregation could become lawful would be, equally, a forbidden objective for the city councils and the courts of Georgia. *Getting in* a trustee who will segregate is not a proper public objective, whatever the subsequent status of his acts will be.

Respondents argue at length against the availability of the doctrine of *cy pres* in this case, though neither petitioners nor the United States as *amicus* have laid any stress on this point in their briefs here. Petitioners cheerfully concede that Georgia controls her own legal terminology, and that if the state law as defined by the state courts cannot call by the name *cy pres* any doctrine which will require the reversal of this case then another name has to be found. The federal doctrine we invoke will not fail merely because it may not fit into the categories of Georgia law. The federal requirement is that the agencies of a state refrain from so acting as to foster and facilitate segregation. They have so acted in this case, and the exactly tailored corrective measure is a mandate requiring that the unconstitutional steps—the acceptance of the resignation and the appointment of new trustees—be recalled.

In the background is the question whether the consequence of opening of this park will be the failure of the trust and reverter to the heirs. That issue has nowhere

yet been briefed or argued; it seems unlikely that this court would let stand an unconstitutional administrative and judicial action, on the ground that to disturb it might, when all the facts are known and all the arguments heard, result in reverter. At this stage, it seems almost enough to say that the express language of Senator Bacon's will seems to make the feared result impossible (R. 19). At the least, no judicial decree of reversion could pretend to implement Senator Bacon's intention, for, here again his intentions were both clear and legally incompatible—(1) to keep Negroes out of Baconsfield and (2) to keep Baconsfield a park forever. Choice between these would not give effect to his will, but would be a judicial choice between two incompatible terms of his will, a choice which the court, a state agent, and not Senator Bacon would be making. It might be added that the *affirmative* purpose of this trust, a park for white people, will not fail if the park is opened to all, for the white people will have as much access to it as they ever had; to hold that the admission, as well, of colored people vitally frustrates the trust would seemingly have to rest on the proposition that, as a matter of law, proximity to Negroes is so great a detriment to whites as to ruin the park for the latter. If the time ever came, petitioners would say what little needs to be said about the standing of that proposition as a state-law ground for decision, in confrontation with the Fourteenth Amendment.

V.

Respondents, in Their Points III-V, Mistake the Application of *Shelley* v. *Kraemer*, the Significance of the Incompatibility of Bacon's Two Desires, and the Significance of the City's Desegregation.

"In *Shelley* v. *Kraemer*," say respondents, "there was involved the right of a Negro citizen to buy property which the owner desired to sell him . . ." This is a flatly mistaken account of *Shelley* v. *Kraemer*, 334 U. S. 1. *Shelley* actually concerned a plaintiff's invocation of the judicial process to prevent a Negro from being in a certain place, on the ground that state contract and real property law gave the plaintiff the right to keep the Negro from being there. The case involved principally the right of a Negro to *occupy* a house in violation of a covenant against Negro *occupancy*, binding on him as a matter of state law, as against the claim of his neighbor to oust him. In *McGhee* v. *Sipes*, 334 U. S. 1, companion case to *Shelley*, and decided on the same day and on the same grounds, the seller was not even a party; in both cases, it was *occupancy*, not *sale* that was at stake. The negative easement held by the plaintiff in *Shelley* was a property right under state law, as well as a contract right, and consisted in the right to have no Negroes *occupying* the property on which the easement lay; so the state court in *McGhee* described it.

On every ground on which the *Shelley* rule might be defined and limited, the present case is a stronger case than *Shelley*. If the *Shelley* rule is to be limited to a context of public impact of discrimination, the park is more in the public life than is the home or even the neighborhood. If the functional equivalence of racial covenants to racial

zoning contributed to the *Shelley* result, then it can be noted that the result of the Georgia Court's action will be, at least hopefully, the functional equivalent of the same old segregated Baconsfield as run by the City. If public involvements collateral to that of the court (e.g., the recording system in *Shelley*) are needful, those are so extensive and so obvious here as to make enumeration at once onerous and needless. If what avails is the lack of competing constitutional values, none are found here.

The one rationally arguable affirmative objection to this Court's action in *Shelley* was that the discrimination complained of there, though enforced by judicial action, originated in an unequivocal choice by private parties. On that score, this case is far stronger than *Shelley*. In that case, the "private choice" was univalent. Here no facade of "construction" can disguise the fact that Senator Bacon plainly wanted, and said he wanted, two legally incompatible things, (1) an all-white park, and (2) a park held by the City. We may guess that he would have then preferred, or now, if living and looking over the modern world, would prefer, one or the other. But the will, besides providing for exclusion of Negroes, very carefully back-stops the provisions for City control. If the City cannot under its Charter serve as trustee, then the City Council is to appoint the new trustee (a provision ignored in the proceedings below), and that trustee is to act subject to "such safeguards and restrictions" as the City Council imposes. The City is authorized to commingle the trust funds in its own treasury (R. 24). The individual trustees for the life of Mrs. Bacon and the daughters had to report annually to the City. The City is to approve new members of the Board of Managers (another provision ignored in the proceedings below).

With all this in the will, it is not open to any court to say that Bacon's desire for public involvement in the management of the park is not clear. In *Shelley* then, the state court had at least enforced the unambiguous will of contracting parties. In this case, the state court had ineluctably to *choose* between equally clear expressions. Such a choice is inescapably an affirmative judicial act, a choice between policies. Confronted with such a choice, no state organ, court or city or board of managers, or all in concert, can be permitted to choose the policy of segregation in the name of carrying out the will of a private donor.

The respondents, to be sure, invite us to speculate on the relative importance to Bacon of these incompatible provisions. Such speculation, to be applicable at all to the current situation, would have to address itself to the question whether Bacon, whose death was closer to Appomattox than to 1965, would prefer to give up his desire for public control of the park rather than give up his desire to segregate. Would he see a common resort to a public park in a city the size of Macon today as constituting "social relations," the thing he desired to avoid? (R. 21) In 1964, a former Senator from a Confederate state led the way to the passage of the Civil Rights Act, and one Congressman from Bacon's own state voted for it and was re-elected. Might Bacon have come to see the present situation somewhat as they see it? These, the only relevant speculations, would be altogether idle. The only thing we know is that Bacon provided, very deliberately, for discrimination and for public control, and that the organs of the State of Georgia, choosing discrimination at the expense of public control, are not "following" a private man's plan for his property, but choosing, on their own responsibility, between two incompatible features of his plan.

Nor does the relatively passive act of the state court—"accepting" the City's resignation—make that judicial act any the less an affirmative act of the State of Georgia. The seeming passivity of this action was made possible only because of the prior preparation of the situation by other organs of the State. Nor is a trustee's "resignation" either perfunctory or perfunctorily acceptable; see Bogert, *Trusts and Trustees,* §§514-515 (1960). Moreover, the Board of Managers, an organ appointed by the City Council, and wielding public power, asked the court for the removal of the City as trustee, in order that segregation might continue. This action alone would suffice to impart "state action" into the pattern; public officials surely may not take affirmative action, as filing this petition was, for the confessed purpose of perpetuating segregation. Had the state court granted this relief on these grounds, the parallel with *Shelley* would have been too exact to leave room for argument. Instead, another holder of state power, the City, changed its position in the middle of the lawsuit and so acted as to enable the state court to grant, in practical effect, the same relief the petition asked for, under the milder rhetorical figure of "accepting" a resignation. The responsibility of the state for the result cannot be affected by the assignment of different roles in the drama to different wielders of state power.

In any event, the action of the state court *in appointing new trustees* was altogether affirmative. Those trustees were appointed in a proceeding commenced by a petition asking for their appointment on the ground that, if appointed, they could exclude Negroes. They were appointed directly after the City had resigned, on the ground, assigned by itself, that the new trustees could exclude Negroes. This appointment, on the record, is an affirmative judicial act aimed

solely at the perpetuation of a discriminatory regime in Baconsfield.

Nor is it a valid objection that the state court's refusal to accept the City's resignation would have compelled the City to remain as trustee unwillingly. In the first place, on the City's own express admissions, that unwillingness was based solely on its unwillingness to run the park on an open basis; this is not the case of compelling service by a trustee as against general objections, or even as against undisclosed objections, but rather it is a case of following to its obvious consequences the rule that no organ of state power may so act with the intent, purpose and effect exclusively to perpetuate racial discrimination. Nor does it appear that the City's being trustee is in any way onerous; to be "trustee" is simply to operate the park, a normal municipal function. (At all events, the policing of this park must to a considerable extent fall on the City.) Georgia municipalities, moreover, enjoy no general immunity from being compelled to perform affirmative duties; in *McCletchey* v. *Atlanta,* 149 Ga. 648, for example, the City was held compellable by mandamus to make an annual appropriation for operating a "cyclorama" and to build up and keep separate a special fund for this purpose, in obedience to state law—a compulsion more "affirmative," if grounded in a less important power, than a compulsory continuance as trustee, where resignation is confessedly in furtherance of segregation. (It seems nearly unnecessary to add that no general state-law rule, whether common-law or statutory, giving cities in general the power to resign trusts in general, can prevail over an obligation of federal constitutional origin, or fix the quality, for federal constitutional purposes, of the act of resigning.)

Finally, only disorder or needless litigation would flow from this court's regarding the case as not yet raising the segregation issue, and the state court's order as not directly implementing segregation. That order was a first step on a road clearly marked by the parties, who have candidly stamped this suit, and the substitution of trustees with which it terminated, as aimed at segregation only. Petitioners insist, then, that far from being inapplicable here, *Shelley* governs this case. The only anxiety petitioners would feel about *Shelley* is that it would be unfortunate if any of the questionings about *Shelley*, any of the uncertainty about the scope of its rule, entered this case. If *Shelley* had never been decided, this case would still be one presenting a clear pattern of state action. It is saturated with state action. No unequivocal private choice is being enforced. The State of Georgia has chosen among policies, and has chosen the segregation policy, no more following the will of a private person than if the opposite choice had been made. If the order of the state court be thought insufficient alone to constitute state action, then one need only advert to the fact that the whole litigation pattern was set up for the court's action by parties who themselves hold state power, and who confessedly took the actions they took in order that segregation might prevail.

VI.

Respondents Are Wrong in Their Contention That §69-504, Georgia Code, Acts 1905, p. 117, Is Not a Significant Consideration in This Case.

Respondents, confronted with Ga. Code §69-504, a statute that explicitly spells out legal sanction for racially segregated public parks of the Baconsfield sort, insist that that statute is not a "significant consideration." They go on to say:

> In 1904, the year prior to the passage of that statute, a testator in Georgia could *obviously* have created a trust involving a park with a municipal corporation as trustee without inserting any racial restriction. Or he could have created such a trust with a racial restriction. (Respondents' Brief, p. 48.) (Emphasis supplied.)

Respondents, in this passage, create a mystery they fail to dispel. Why, if the law of 1904 was so clear, did the Georgia legislature, in 1905, go to the trouble it did in passing this section?

Petitioners contend that the answer first suggesting itself —that Georgia Law was at the least not clear on this point—is borne out by all the materials now accessible.

First, the Georgia Code of 1895, covering this matter, seems to name no category including parks as a subject of charitable trusts. The Code enumeration is as follows:

> §4008. (3157.) *Subjects of charity.* The following subjects are proper matters of charity for the jurisdiction of equity:

1. The relief of aged, impotent, diseased or poor people.

2. Every educational purpose.

3. Provisions for religious instruction or worship.

4. For the construction or repair of public works, or highways, or other public conveniences.

5. The promotion of any craft or persons engaging therein.

6. For the redemption or relief of prisoners or captives.

7. For the improvement or repair of burying-grounds or tombstones.

8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

"The promotion of human civilization" would seem a pretentious statement of the objective of a park; for a state court to hold that segregating a park constitutes such a promotion of civilization would violate the Fourteenth Amendment. No "construction or repair" is the principal subject of this trust. No Georgia court, by the respondents' own account, had ever held any part of this section applicable to a park, in all the years before §69-504 became law. This really is enough to establish the entire uncertainty, in the Georgia law as Senator Bacon new it, of the propositions so confidently put forward by the respondents.

There is much more, however. The respondents, ignoring and not citing the applicable Georgia Code section just quoted, deal with the matter as one of "common law." They do not tell us why that law in its pristine state applied, in

the face of the Code enumeration. More significantly, they do not advert to the grounds on which other jurisdictions than Georgia had upheld charitable trusts for parks. Those grounds were two in number, not unconnected. These are summarized in 4 Pomeroy Equity §1024, as follows:

> 4. *Other Public Purposes.*—Other public purposes, not in the ordinary sense ***benevolent,*** may be valid charities, since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public, either of the entire country or of some particular district, or to lighten the public burdens for defraying the necessary expenses of local administration which rest upon the inhabitants of a designated region.

There being no Georgia cases, this synthesis of the "common law" elsewhere is significant. The park, where held a public charity, is so held because it benefits the whole public, or because its receipt free of charge lightens the expense of the performance of a governmental function. The upholding of racially segregated parks, as objects of public charity, would be a contradiction in terms on the first of these theories, and the second of them so deeply implicates the charitable trust in the governmental plan as to make its enforcement plainly obnoxious to the Fourteenth Amendment, as against the "state action" objection.

Thus, as one would confidently expect when so carefully drawn a statute as §69-504 is put through the state legislature, the prior Georgia law was at least doubtful. It is against the parts of that law that were not doubtful that §69-504, and its operation, are to be judged. A very clear role can be assigned this statute, so mysterious a phenomenon on respondents' account, when one adverts to the law

of parks in Georgia, as plainly seen in the old Georgia cases.

As respondents say, "no Georgia case had dealt with a charity involving a park . . . " But plenty of Georgia cases had dealt with parks, treating them, as the common law traditionally does, as lands "dedicated to the public," the members of the public, as such, having easements of enjoyment in them.

The leading case, never lost sight of in later opinions, is *Mayor and Council of the City of Macon* v. *Franklin*, 12 Ga. 239 (1852). In a luminous opinion, Judge Nisbet learnedly reviews the doctrine of "dedication," concluding:

> Dedications of lands for charitable and religious purposes, and for public highways, are valid without any grantee to hold the fee, and the principle upon which they are sustained, sustains dedications of streets, squares and commons. *City of Cincinnati* vs. *The Lessee of White*, 6 *Peters'* R. 435, 436. *Beatty* vs. *Kurts*, 2 *Peters'* R. 256. *Town of Paulett* vs. *Clark*, 9 *Cranch*, 292. *Lade* vs. *Shepherd*, 2 *Stra.* 2004. 12 *Wheat.* 582.
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> That commons and squares are subjects of dedication, and under the principles which govern streets and highways, see the great case of *The City of Cincinnati* vs. *White's Lessees*, 6 *Peters*, 431. *Watertown* vs. *Cohen*, 4 *Paige* R. 510. *State* vs. *Wilkinson*, 2 *Vermont* R. 480. *Pearsoll* vs. *Post*, 20 *Wend.* 111. 22 *Wend.* 425. (12 Ga. at 244-45.)

The holding of the case was that The *City of Macon* might not sell for a private use land which it had itself "dedicated" to the public as a public square or common.

Other Georgia cases treat public parks and analogous tracts as "dedicated," with reciprocal public easements. *County of Gordon* v. *Mayor of Calhoun,* 128 Ga. 781 (1907), decided a few years after the passage of §69-504, shows that the Georgia court, which by respondents' correct account never dealt with a park as the subject of a charitable trust, thoroughly knew the "common," with its accompanying public easements, as the legal device by which parks were maintained as such. See also *Pettit* v. *Mayor and Council of Macon,* 95 Ga. 645 (1894).

There was, however, one difficulty, not much felt, perhaps, in 1852, the year of *Macon* v. *Franklin,* but later a cloud that could have been seen on the horizon. The "dedication" that creates a public park is *to the public as a whole.* Georgia law was of one voice on this, *Ford* v. *Harris,* 95 Ga. 97, 100 (1894); *East Atlanta Land Co.* v. *Mowrer,* 138 Ga. 380, 388 (1912); *Western Union Telegraph Co.* v. *Georgia Railroad and Banking Co.,* 227 F. 276 (S. D. Ga. 1915). The concept of "dedication" left no room for selecting parts of the "public" to enjoy the public easement; there was no middle ground, conceptually, between the public use, comprehensive as to the public, and the private easement, an unsatisfactory legal basis for operating a public park.

The expectable trouble developed, not as to parks, but as to the analogous case of the cemetery. In *Brown* v. *Gunn,* 75 Ga. 441 (1885), "persons of color" claimed, as members of the public, the right to be buried or to bury their dead in a cemetery they contended had been "dedicated" to the public. The court held, on the facts, that no "dedication" had taken place, but there was no suggestion, in the opinion, that such "dedication" could conceivably, as a matter of law, have been to the white public only.

This, then, was the background of §69-504:

1. No provision in the purportedly exhaustive Code enumeration authorized the setting up of a charitable trust for a park.

2. The "common law" of the subject, outside Georgia, generally rested the inclusion of parks in the subject-matter of charitable trusts on two grounds, one of which was incompatible with racial exclusion and the other of which so deeply involved the interests of government in the operation of the park as to make it likely that "state action" would be found.

3. No Georgia case had ever held a park, racially restricted or not, to be the proper subject of a charitable trust.

4. Georgia's public parks were conceived as "dedicated" commons, with corresponding public easements. This concept, thoroughly familiar to the Georgia court, had no room for restriction to parts of the public. Thus, the only sure and well-travelled way of giving one's land for a public park—"dedicating" it to the public—contained no means of enforcing a racial restriction.

5. In at least one case that got as far as the state's highest court, Negroes, asserting the very claim so irresistibly suggested by all the foregoing, had sought to enjoy their easement in "dedicated" property, and had been turned away only on a narrow finding of fact.

Petitioners are emboldened to think that the situation defined by these numbered points was the one §69-504 was designed to meet, because it is the very situation to which

it appears to address itself. It reads and sounds like remedial legislation, and if it was, this was what it was designed to remedy. In any case, this is the legal background against which it became law.

Against that background §69-504 is no longer the puzzle, the mystery, that respondents have made of it. That section supplies the one thing needful—permission to give land as a park with racial restrictions—and it supplies that alone. Before it was passed, anybody who wanted to give his land as a park for the whole public could "dedicate" it, in the time-honored way. The single practical change the section made was that he now could restrict his gift racially—not in general or in any way he wished, but only racially.

The 1905 statute, then, by the leave and only by the leave of which this racially restrictive term was inserted in Senator Bacon's will, was a specifically hostile state act against the colored race, authorizing clearly, for the first time in Georgia law, their exclusion from parks otherwise public. That was its minimum effect. Here we have what one would never have expected to encounter in such explicit clarity, literally that very thing which Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 at 727 (1961), found by inference: "... This legislative enactment ... authorizing discrimination based exclusively on color." Here is no mere general declaration of a right to discriminate on any grounds, but rather on the one hand the lending of Georgia's law sanction, for the first time so far as one can tell, to charitable trusts for public parks, with the proviso that racial discrimination and that discrimination alone, is to be permitted—and, on the other hand, the plugging of a loophole

that had made racial discrimination difficult in the law of public parks as it actually had existed in Georgia. Surely one may say, as Mr. Justice Stewart said in *Burton*, "Such a law seems . . . clearly violative of the Fourteenth Amendment." 365 U. S. at 727.

This is the minimum effect of this statute. But is it not also clear that, against this background, any citizen must see that the state is at least suggesting discrimination? Even on respondents' own account, is this not the necessary effect of such a statute? If it were, as they contend, merely declaratory of one consequence of a general capacity in testators to discriminate in any manner, must it not for that very reason function as a mark of the state's special interest in this form of discrimination? Against the legal backdrop that actually existed, on the other hand, it must surely signal to all a state policy of fostering and favoring segregation, evidenced in the most convincing manner by solicitude to make such segregation possible against all previous objections of a technical cast.

Finally, a careful lawyer, seeing in §69-504 his only reliable Georgia authority for setting up a trust for a park, might well be afraid to count on a later time's reading of a statute so clearly racial in its thrust. The verbal problem he would have would not be, as respondents would have this Court believe, that of the meaning of the word "may." The problem would be whether the act which, under the statute, the testator "may" perform is (1) the conveyance of land for a park with or without any of the conditions enumerated; or (2) the conveyance of the land together with the one he chooses from among those conditions. Stranger feats of statutory construction have been per-

formed than a court's reading this language to have the latter meaning.

This general point is not, however, the only reliance in this case. What Senator Bacon actually did, in the first instance, was to leave his land in trust as a park for the *white women and children* of Macon (R. 19). Now §69-504, on its face and with no ambiguity whatever, fails to authorize a gift *to women and children on an unsegregated basis.* It authorizes a gift for white women and children only, *or* for colored women and children only, *or* for women and children of any other race only, but none for women and children of all races together. Had Senator Bacon, therefore, wished to leave his park for *all* women and children, he would have had to conclude that he could not lawfully do so under §69-504, and that if he tried to do so on an alternative "common law" theory he would be met not only by all the difficulties above discussed, but also by the powerful argument that this carefully drawn statute, enumerating permitted discriminations, excluded others by implication. The Board of Managers, to be sure, later opened the park to all whites. But Bacon could not have known they would, and authorized them not to. Under §69-504, he could not have authorized them to exclude all men, and admit all women and children.

The actual effect of all this on Senator Bacon's mind is not important. *Peterson* v. *City of Greenville,* 373 U. S. 244. What is important is that the State of Georgia, in passing this statute:

> (1) Supplied the specific thing its law had lacked—a clear means for a private person's giving his land for a "public" park on racially discriminatory terms.

(2) In the context of prior law, signalled the state's anxious interest in seeing racial discrimination (rather than mere general "freedom of choice") authorized and practiced.

(3) Engendered legal doubt that any trust for a park would be valid without racial discrimination, and, unless its readable text and normal implications be ignored, made flatly unlawful the non-racist rule of admission—"women and children only"—corresponding to the racist rule—"white women and children only"—actually adopted in this case, thus in effect commanding segregation by race if a "women and children" park was wanted.

Respondents say that this section is "not significant," and that petitioners' attempt to have the Court view it as being so "will not bear analysis." On the foregoing considerations, petitioners submit that respondents have mistaken the position.

CONCLUSION

The acceptance of the City's resignation and the appointment of new trustees constituted a judicial action confirmatory of actions of other organs of state power, having the express sole aim of reinstituting racial discrimination in Baconsfield. While petitioners strongly urge that this renewed segregation is in itself illegal, the decree entered violates the Fourteenth Amendment, on either of the two possible views as to the latter question. Respondents' arguments fail to cast serious doubt on this conclusion.

Petitioners therefore renew their prayer that the judgment of the Supreme Court of Georgia be reversed, and that the reversal of the Superior Court's decree be ordered.

Respectfully submitted,

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